

REPORTS FROM THE FRONT LINES OF THE ART AND CULTURAL PROPERTY WARS

I. INTRODUCTION

A. *Synopsis**

The recent fierce dispute over censorship at the Brooklyn Museum of Art and the impassioned debate at the British Museum over the Parthenon marbles remind us yet again that issues involving art and cultural property are complicated, seemingly intractable, and strike us at our core. Art and cultural heritage are some of the major building blocks a society uses to define itself, its values, its sense of community, and its conception of the individual. Censorship and efforts to trespass on the perceived moral rights of artists routinely trigger an intense reaction, because the community as a whole often believes that its very identity is tied up with the fate of its artists. The same is true with cultural property. Disputes over artifacts stoke a society's fires because they help a community understand what it is, what it has achieved, and what it values.

This conference explored these dominating concerns and tried to untangle and define the basic values so much in conflict in the art and cultural property wars that routinely make headline news. It also sought to explore how future developments—especially new technologies—may substantially affect the visual arts, the role of museums, and the very concept of art and its objects.

Lastly, this conference honored John Henry Merryman, whose writings over several decades have defined with incisive clarity and prescience these seminal topics. Prominent scholars and cultural leaders spent an intense day examining selected topics that not only deepened our understanding of the particulars, but illuminated the whole.

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INTRODUCTORY COMMENTS

SCHULYER G. CHAPIN*

Thank you very much. When I received the invitation to come here this morning, in a very charming and somewhat flattering letter, I wondered why I was asked to speak on a day devoted to intellectual property and cultural international problems at one of the most distinguished law schools when I'm not a lawyer? And, then it dawned on me. It dawned on me on my way here this morning that perhaps the reason this invitation was extended had to do something with the Brooklyn Museum.¹

So, I thought that I would simply tell all of you the story of the Brooklyn Museum and the recent fracas as it actually happened.² As everyone in this room is aware, lots of stories about lots of supposed reasons for it have floated back and forth since the whole business began.³ What happened was this: the Mayor lost his temper. He lost his temper at a morning staff meeting. He lost it because of a variety of reasons, but especially because the Catholic League had been down his throat about this matter.⁴ The Catholic League and the Mayor are constantly at odds on the subject of abortion.⁵ The Catholic League tried to shut down Terrence Radigan's play, *Corpus Christi*, and failed.⁶ Now they were hammering

* Commissioner of New York City's Department of Cultural Affairs.

¹ The Brooklyn Museum of Art features Egyptian, Classical, Ancient Middle Eastern, African, Pacific, and North and South American art, including paintings, sculpture, print drawings and photography. The Museum is located at 200 Eastern Parkway in Brooklyn, New York.

² See David Barstow, *Public at Last Sees the Art Behind the Fuss*, N.Y. TIMES, Oct. 3, 1999, §1 at 1; see also *Artnewsroom.com*, *Sensation: Young British Artists from the Saatchi Collection* (1999), available at <http://artnewsroom.com/flash/Guiliani-ny.htm> (last visited Mar. 29, 2001).

³ See Alan Feuer, *Guiliani Dropping His Bitter Battle with Art Museum*, N.Y. TIMES, Mar. 28, 2000, at A1.

⁴ See Press Release, Catholic League for Religious and Civil Rights, *Catholics to Rally at Brooklyn Museum of Art* (Sept. 29, 1999), available at http://www.catholicleague.com/99press_releases/pr0399.htm (last visited Mar. 16, 2001); see also Press Release, Catholic League for Religious and Civil Rights, *Catholics Salute Guiliani on "Snuff Art;" Hillary's Position Sought* (Sept. 23, 1999), available at http://www.catholicleague.com/99press_releases/pr0399.htm (last visited Mar. 16, 2001); Press Release, Catholic League for Religious and Civil Rights, *Vomit bag Protest Mounts at Brooklyn Museum* (Oct. 2, 1999), available at http://www.catholicleague.com/99press_releases/pr0399.htm (last visited Mar. 16, 2001).

⁵ The Catholic League for Religious and Civil Rights takes an anti-abortion stand, while Mayor Guiliani supports abortion rights. See Toby Harnden, *Guiliani Cancer May Decide Senate Race*, THE DAILY TELEGRAPH, Apr. 28, 2000, at 17; see also *Political Ticker*, Cox News Service (Feb. 25, 2000), available at LEXIS, News Library.

⁶ See *"Corpus Christi" to Run in Fall; Protest Mounts*, THE CATALYST (Jul./Aug. 1998), available at http://www.catholicleague.com/catalyst/1998_catalyst/698catalyst.htm (last visited Mar. 16, 2001); Letter from William A. Donohue, President, Catholic League for

away at the Brooklyn Museum's Sensation Exhibition.⁷ Furthermore, as a Catholic, the Mayor initially felt that perhaps the famous picture of the Virgin Mary was not appropriate in his view of what might be thought of as appropriate art on that subject.⁸ However, there were two pieces that appeared in the New York Daily News, buried in the middle of the newspaper about the Sensation Exhibition.⁹ There was also the fact that the Sensation Exhibition had been promoted in a way that emphasized the sensation part and minimized, in a way, the artistic part.¹⁰

In any event, on that particular morning, I suspect the Mayor was in a bad mood. His press secretary pointed out two articles about the Sensation in the Daily News, and he got angry. He decided that this was ridiculous. The Brooklyn Museum should cancel the exhibition, or not receive city money. This was not a long thought out decision. It was one based on his intellectual and artistic interests. But, it was basically anger.

The anger was reflected by a telephone call that I received at 9:15 the morning of the blow up. I was informed that I should tell the Brooklyn Museum that if, in fact, it did not cancel Sensation, their city funding would be taken away.¹¹ I said to the budget director at that time, "What are you talking about? It's not our money." It did not make any difference. This is what we had to do.

I telephoned Arnold Lehman.¹² I suggested that he sit down before I passed on this information. He did. Once I explained the directive, he did what anybody in this room would have done; he sort of blew up. I suggested that he might just stay calm and not act for an hour or two until I could really get to the bottom [of] it all.

I went down to City Hall. Oddly enough, no one would talk to me. The deputy mayor that I normally deal with was very busy. Finally, I caught up with one of the deputy mayors who indicated that they really wanted to have a nuclear explosion. I said, "Well

Religious and Civil Rights New York City, to A.J. Esta, Staff Writer, *BACK STAGE*, Nov. 10, 2000, at 6; Hap Erstein, *Cuillo Upgrades Options: New Piano Bar, Cabaret*, *THE PALM BEACH POST*, Sept. 1, 2000, at 33.

⁷ See *supra* note 2.

⁸ See David Barstow & David M. Herszenhorn, *Brooklyn Museum Official Discussed Removing an Offending Work*, *N.Y. TIMES*, Sept. 28, 1999, available at <http://www.Andrew.cmu.edu/course/76-101G/Brooklyn/brooklyn1.html> (last visited Mar. 16, 2001); see also Frank Lombardi & Owen Moritz, *Rudy Going After 'Sick' Exhibit*, *DAILY NEWS*, Sept. 23, 1999, at 6.

⁹ Lombardi & Moritz, *supra* note 8; see also Douglas Feiden, *Brooklyn Gallery of Horror: Gruesome Museum Stirs Controversy*, *DAILY NEWS*, Sept. 16, 1999, at 6.

¹⁰ See Feiden, *supra* note 9.

¹¹ See Lombardi & Moritz, *supra* note 8.

¹² Mr. Arnold L. Lehman is the current Director of the Brooklyn Museum.

you will." Four o'clock on that particular afternoon, the Mayor went public with his feelings about the Brooklyn Museum.¹³ That evening I was scheduled to speak at the opening of the Whitney Museum, Part Two of the Art of the 20th Century exhibit. I even had a mayoral letter praising the exhibition. When I arrived at the museum, four museum directors and a host of other people were around my neck. "What was this all about?" I said, "You know as much about it as I do."

I did, however, have this letter, which was in praise of the Whitney Museum's upcoming show. It was suggested to me by the museum Chairman that perhaps I should not read the letter. I informed the Chairman that I had no intention of reading the letter. I further added that I had no intentions of speaking. However, the Chairman insisted that I speak.

So, I got up when asked. I noted as I looked around the room that it was, to put it charitably, filled with not very many friendly faces. I first acknowledged what I thought was true: that at this moment in time not everyone in this room had the Mayor as their favorite person. There were some sort of cranky smiles. Then I suggested that people ought to think about the future. I reminded the audience that this Mayor and his lasting legacy is the re-establishment of the arts in the public school system. As many of you know, the arts were taken out of the schools in the 1970s during the city's financial crisis. It was Mayor Guiliani who put the arts back, and back in a very real way. One example is Project ARTS, which is a \$100,000,000 plan to restore the arts to every one of the 1,100 schools in the system.¹⁴ Furthermore, the Annenberg Grant for arts education aligns schools and artistic organizations in the city.¹⁵ I proceeded to tell the audience that they should think about the future, not so much about the present. I was surprised that there was some applause when I finished speaking. But, I was more relieved to be finished speaking at that point than ever before in my career. I thought that the Brooklyn Museum matter would somehow be resolved, and that I, as the Commissioner of Cultural Affairs, could stay on the sidelines.

It became obvious as the events proceeded that I could not do

¹³ The Mayor expressed his views at a press conference on September 22, 1999. See Dan Barry and Carol Vogel, *Giuliani Vows To Cut Subsidy Over "Sick" Art*, *N. Y. TIMES*, Sept. 23, 1999, at A1.

¹⁴ Project ARTS stands for "Arts Restoration Throughout the Schools." For an overview of the program and its funding, see Project ARTS, at <http://www.nycenet.edu/projectarts/Pages/HmOver.htm> (last visited Feb. 22, 2001).

¹⁵ See Mayor Rudolf W. Guiliani speech on Annenberg Grant Announcement, at <http://www.ci.nyc.ny.us/html/om/html/96/annenberg.html> (last visited Mar. 1, 2001).

that. I was particularly stirred by the terrible propaganda that began to grow out of the incident. The implications that Arnold Lehman was somehow anti-Catholic, and that the Catholic League and the American Civil Liberties Union were standing on the same stage talking about anti-Semitism and anti-Catholicism were building up into something that looked and smelled like a Joseph Goebbels scenario. I realized that I had to oppose the Mayor.

I prepared a statement and made an appointment to see him. I went down to his office, and we talked. I informed the Mayor that I had hoped I would be able to stand aside on this matter, but I could not. I explained why I felt the City's position was wrong. We had a thoroughly professional and a thoroughly collegial discussion. I showed him my statement and I proposed to give it to the press. The Mayor reviewed the statement and actually did a brilliant summation.

Present at the meeting were Michael Hess, the Corporation Counsel, and Denny Young, the Mayor's own general counsel. They asked me if I could withhold my statement at least until the Friday of that week because the City was going to court on Friday morning.¹⁶ It would be embarrassing if I came out against them before they went to court. This was a very reasonable request, so I agreed. As far as I was concerned, [the] release would occur Friday.

When I did release my statement, it came out on Saturday.¹⁷ Thankfully, the piece read exactly the way I had hoped it would. I support the Mayor on what he has done to the schools, particularly on arts education, and I have worked very closely with him. All of that support was reflected in the statement. However, I had no idea my statement would have the effect that it did. In my case, Andy Warhol's "fifteen minutes of fame" lasted more than six weeks. In a sense, my position was like a surgeon who had opened up a carbuncle. A lot of poison, a lot of concern, and a lot of everything else started coming out.

As you all know, the matter has been settled. One can say that the battle of the Brooklyn Museum is over, but the war is far from won. And, it is not just in this city, but also nationally. All you have to do is to remember back about Mapplethorpe, Serrano, Jesse

¹⁶ The Brooklyn Museum sued the city of New York alleging that the deprivation of funding violated the First Amendment. Oral arguments were heard on Friday, October 8, 1999. See generally *Brooklyn Inst. of Arts & Sciences v. City of New York & Rudolph W. Giuliani*, 64 F. Supp. 2d 184 (E.D.N.Y. 1999).

¹⁷ See Ralph Blumenthal, *City Administration Official Opposes Giuliani on Museum*, N.Y. TIMES, Oct. 9, 1999, at B1.

Helms, and Frohnmayer,¹⁸ then the Chairman of the National Endowment for the Arts, and realize that all that has happened since those days is scar tissue. The Brooklyn Museum incident added another cut, and hopefully another layer of scar tissue. But, we are a very nervous nation when it comes to public support of the arts. We will probably continue to be wary, because it is something that, until the New Deal, was never a major part of government activity except in this city.¹⁹

I do not suppose there are many of you in this room that know how long the city has had its relationship with its cultural institutions. It all started in 1870 after the Civil War when a group of citizens approached the mayor with the idea of establishing a museum of natural history for the children.²⁰ They proposed that the city should take city land, erect a building, and lease it to the trustees of the Museum of Natural History, who would be responsible for the purposes of the new museum. The governor of the state approved of this. Land was taken and the building constructed. The principal building still resides in the same location, and additions have been made over the years.

Subsequently, a group of people who observed what had been done for the science museum project came to the mayor and asked if the city would do the same for art. There were several collectors who had no museum of art in this city. So, the same formula was employed to create the Metropolitan Museum of Art.²¹ From 1870 to 1994, the city had under its portfolio what was known as the

¹⁸ The Mapplethorpe exhibit featured a series of sexually explicit images including a young girl's exposed vagina and a man with a bullwhip protruding from his rectum. See Lackland H. Bloom, Jr., *NEA v. Finley: A Decision in Search of a Rationale*, 77 WASH. U.L.Q. 1, 3 (1999). Serrano's work entitled "Piss Christ" depicted a crucifix submerged in urine. See Symposium, *Art, Distribution & The State: Perspectives on the National Endowment for the Arts*, 17 CARDOZO ARTS & ENT. L. J. 705, 706 (1999). Jesse Helms is a Republican senator from North Carolina. Helms has proposed numerous legislative restrictions on what the NEA should be allowed to fund, often excluding art which denigrates religion or displays sexual acts or excrements. See Nan Levinson, *A Democracy of Voices: Free Expression in the U.S.*, THE ANDY WARHOL FOUNDATION FOR THE VISUAL ARTS PAPER SERIES ON THE ARTS, CULTURE, AND SOCIETY, Paper Num. 6, at <http://www.warholfoundation.org/article6.htm> (last visited Feb. 22, 2001). John Frohnmayer was chairman of the NEA from 1989-1992. See National Council on the Arts: Former Members, available at <http://arts.endow.gov/learn/nca/council.html> (last visited Mar. 16, 2001). Frohnmayer became a controversial figure when he vetoed several "obscene" projects that the board had approved for funding. See generally *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998).

¹⁹ See *Exhibit: A New Deal For The Arts*, National Archives and Records Administration, available at <http://www.nara.gov/exhall/newdeal/newdeal.html> (last visited Mar. 29, 2001).

²⁰ See *Museums*, at <http://www.newyorkmall.com/museums.html> (last visited Mar. 29, 2001); see also *Brooklyn Inst.*, 64 F. Supp. 2d at 187.

²¹ See *Brooklyn Inst.*, 64 F. Supp. 2d at 187.

cultural institutions group.²² There are 34 organizations, which the city now owns.²³ They possess either land or buildings or both. The city has had a landlord relationship with these organizations since the beginning—1870.

The reality however, is that we also end up with each of these in budgets crisis negotiations. There simply is not as much money as there should be. Hopefully, in some administration in the future, greater funds will be available. But, we generally end up with a reasonable approach to both the cultural institutions group and the 500 other organizations that we fund in a major or minor way that really bring out private funding. It's a public-private partnership. So, this city has been in this kind of activity for a long time.

I think one should look at the Brooklyn Museum situation from every angle. It started with distemper. It ended with a decrement following the First Amendment Ruling.²⁴ There will probably be other situations like this around the country, or maybe even here. By nature we are skittish about arts funding from the public sector. Perhaps my hope is that this skittishness can turn to realization that this is one of our major obligations as a city and as a nation to fund and foster the arts as we move into the future.

I do thank you for asking me to come this morning. I know you are going to be discussing the Brooklyn Museum. As I previously mentioned, I am glad that battle is over. But, I do not think the war is yet won. Thank you, Sirs.

²² See *City of New York Funded Cultural Institutions*, Cultural Institutions Group (CIG), available at <http://www.ci.nyc.ny.us/html/dcla/html/cig.html> (last visited Mar. 29, 2001).

²³ See *id.*

²⁴ See generally *Brooklyn Inst.*, 64 F. Supp. 2d at 184.